

Lodged Proposed  
Order

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CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF  
SANTA ANA  
BY: [Signature]

FILED

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
MICHAEL JOHN AVENATTI,  
  
Defendant.

Case No. SA CR No. 19-061-JVS

**EX PARTE APPLICATION FOR AN  
ORDER APPOINTING COUNSEL**

Deputy Federal Public Defenders Georgina Wakefield and Cuauhtemoc Ortega  
hereby file this *ex parte* application for an order appointing counsel to represent  
Michael Avenatti in this case.

Respectfully submitted,

HILARY POTASHNER  
Federal Public Defender

DATED: May 14, 2019

By /s/ GEORGINA WAKEFIELD  
GEORGINA WAKEFIELD  
Deputy Federal Public Defender

## I. INTRODUCTION

Michael Avenatti respectfully requests that the Court appoint counsel to represent him without requiring that he submit a financial affidavit at this stage of the case. To be clear, Mr. Avenatti is amenable to and requests an opportunity to contribute significantly to his representation. However, he asks that the Court defer determination of the amount of contribution until the end of the case in light of the complexity of his financial situation and the case, along with the real and appreciable risks of self-incrimination given the nature of the charges in this case.

## II. FACTUAL AND PROCEDURAL HISTORY

On March 22, 2019, the United States Attorney's Office for the Central District of California filed a 198-page criminal complaint and affidavit against Mr. Avenatti alleging bank fraud in violation of 18 U.S.C. § 1344(1) and wire fraud in violation of 18 U.S.C. § 1343. (Doc. No. 1.) Mr. Avenatti was arrested in New York and made his initial appearance in the Southern District of New York on March 25, 2019. (Doc. No. 13.) Mr. Avenatti later made his initial appearance in the Central District of California. (Doc. No. 10.)

On April 10, 2019, the government filed a 61-page indictment charging Mr. Avenatti with 36 counts of fraud, tax related crimes, false statement offenses, and aggravated identity theft. (Doc. No. 16.) The indictment also alleges two forfeiture counts. (*Id.*) Mr. Avenatti appeared without counsel for his arraignment. (Doc. No. 23.) The court (the Honorable Magistrate Judge John D. Early) appointed counsel for Mr. Avenatti for arraignment only and ordered the parties to schedule a hearing before this Court to address Mr. Avenatti's representation. (*Id.*)

Mr. Avenatti is facing separate charges in the Southern District of New York. *See United States v. Avenatti*, 19 Mag. 2927 (S.D.N.Y.). The United States Attorney's Office there filed a criminal complaint alleging a scheme to extort Nike USA, Inc. The

intended loss amount alleged in the complaint is more than \$20 million. Arraignment is scheduled for May 28, 2019.

### III. ARGUMENT

#### A. The Court Should Appoint the Office of the Federal Public Defender to Represent Mr. Avenatti in this Case Subject to an Order of Contribution

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. AMEND. VI. Congress enacted the Criminal Justice Act of 1964 to effectuate the Sixth Amendment guarantee of counsel. The Act requires each district court to establish “a plan for furnishing representation for any person financially unable to obtain adequate representation . . . .” 18 U.S.C. § 3006A. The Central District of California has adopted a Local CJA Plan which has been approved by the Ninth Circuit Judicial Council. *See* General Order No. 13-09. The Guide to Judiciary Policies and Procedures, approved by the Judicial Council of the United States (“Guide”), provides direction to the court with respect to application of the statute.<sup>1</sup>

The Guide indicates that a defendant is “financially unable to obtain counsel” under the Act if his or her “net financial resources and income are insufficient to obtain *qualified* counsel.” Guide, Vol. VII, Pt. A, § 210.40.30(a)(emphasis added). However, even if a defendant’s net resources and income are in excess of the amount needed to cover the necessities of life, the court should find the defendant eligible for the appointment of counsel and order contribution when those excess funds are insufficient to pay fully for retained counsel. *Id.* at § 210.40.40. Mr. Avenatti submits that he falls

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<sup>1</sup> Volume 7, Part A, which provides the guidelines for administering the CJA, is available online at [https://www.uscourts.gov/sites/default/files/vol\\_07a.pdf](https://www.uscourts.gov/sites/default/files/vol_07a.pdf) (last visited May 13, 2019).

1 into the latter category of eligibility and requests an opportunity to contribute to his  
2 representation.

3 The Guide provides that “[a]ny doubts as to eligibility should be resolved in the  
4 defendant’s favor; erroneous determinations of eligibility may be corrected at a later  
5 time.” *Id.* § 210.40.30(b). Application of the CJA to a defendant seeking counsel has a  
6 constitutional dimension and forcing a defendant to go to trial pro se without  
7 conducting an appropriate inquiry “constitutes a denial of that defendant’s sixth  
8 amendment right to counsel.” *United States v. Harris*, 707 F.2d 653, 662 (2d Cir.),  
9 *cert. denied*, 464 U.S. 997 (1983).

10 This Court has broad discretion in appointing counsel. The Guide indicates that  
11 fact-finding concerning the person’s eligibility for appointment of counsel should be  
12 completed prior to the person’s first appearance in court, unless it will result in undue  
13 delay. Guide, Vol. VII, Pt. A, § 210.40.20(b). *The Guide also suggests that the court*  
14 *may make a final determination regarding eligibility at the end of the case.*

15 Specifically, prior to sentencing, the court should consider pertinent information  
16 contained in the Presentence Report, the court’s intention with respect to fines and  
17 restitution, and all other available data bearing on the person’s financial condition in  
18 order to make a final determination about whether the defendant then has funds  
19 available to pay for some or all of the costs of representation. *Id.*, § 210.40.30(d). In  
20 appropriate circumstances, the court should enter an order of reimbursement. *Id.*, §  
21 210.40.30(d).

22 The CJA Form 23 (Financial Affidavit) is a tool that has been developed to aid a  
23 court’s inquiry into a defendant’s financial status. However, the use of CJA Form 23 is  
24 not mandatory. The Act does not require its use, but merely provides that the court  
25 conduct an appropriate inquiry. 18 U.S.C. § 3006A; *see also United States v. Lexin*,  
26 434 F.Supp.2d 836, 843-44 (S.D. Cal. 2006). The Central District’s CJA Plan tracks  
27 the language of the statute. *See* General Order No. 13-09 at page 9, § (IV)(d)(1) (“The  
28 determination of eligibility for representation under the CJA is a judicial function to be

1 performed by a district judge or magistrate judge after making appropriate inquiries  
 2 concerning the person's financial condition."').<sup>2</sup>

3 Counsel submits that this Court should appoint counsel without requiring Mr.  
 4 Avenatti to submit the CJA Form 23 at this stage of the case. As indicated above, Mr.  
 5 Avenatti is amenable to an order of contribution. However, it is requested that the  
 6 Court make the determination as to the amount of contribution at the end of the case for  
 7 the following reasons:

8 1. Providing a complete picture of Mr. Avenatti's finances at this stage of the  
 9 proceeding would be a demanding and time-intensive effort. Mr. Avenatti is involved  
 10 in several lawsuits requiring ongoing expense and financial responsibility. In addition  
 11 to the New York criminal case, Mr. Avenatti is a party to several civil lawsuits—both  
 12 personally and professionally—at various stages of the proceedings, including on appeal.  
 13 He has continuing obligations to counsel on those cases and is uncertain as to the  
 14 ongoing costs and expenses associated with that litigation. It would be difficult, if not  
 15 impossible, to fully capture the ongoing liabilities and potential financial assets at stake  
 16 in these other proceedings at any given moment. The Guide specifically permits the  
 17 court to defer fact-finding regarding the eligibility for court-appointed representation  
 18 when it would otherwise result in undue delay. Guide, Vol. VII, Pt. A, § 210.40.20(d).

19 2. Mr. Avenatti is in the difficult position of facing federal criminal charges  
 20 and needing counsel on both coasts at the same time. This case in particular is complex  
 21 and will require significant resources. The indictment charges Mr. Avenatti with 36  
 22 criminal counts and two forfeiture allegations. The government has identified the case  
 23 as complex and estimates that its case-in-chief will be 15 trial days. (Doc. No. 18.)  
 24 Counsel's understanding is that discovery is voluminous. Mr. Avenatti has tried to  
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26 <sup>2</sup> While the Guide indicates that relevant information bearing on a person's  
 27 financial eligibility should be reflected on CJA Form 23, it has cautioned that the  
 28 government should not participate in its preparation or seek to obtain information from  
 it. Guide, Vol. VII, Pt. A, § 210.40.20.

1 secure private counsel over the course of the past month but has been unsuccessful due  
2 in large part to the government's forfeiture counts. Trial is set for June 4, 2019. Given  
3 the complexity and volume of this case, counsel should be appointed now to review  
4 discovery, advise Mr. Avenatti, and address the upcoming trial date.<sup>3</sup>

5         3. In addition, Mr. Avenatti is concerned that the government will seek to use  
6 his statements against him in this or the New York case. The indictment charges Mr.  
7 Avenatti with several fraud counts related to financial transactions spanning a nearly  
8 five-year period and with several tax counts related to Mr. Avenatti's businesses and  
9 personal income taxes. The indictment also contains two forfeiture allegations, which  
10 seek to trace assets involved in or traceable to the criminal charges and forfeiture of  
11 such traceable assets. Accordingly, the allegations and charges of the indictment raise  
12 issues which directly concern the status of Mr. Avenatti's finances. While the case law  
13 permits filing the financial affidavit *in camera* in order to preserve a defendant's Fifth  
14 Amendment protection against self-incrimination when seeking the appointment of  
15 counsel, prosecutors and the public nonetheless attempt to unseal those documents.  
16 *See, e.g., United States v. Hyde*, 208 F.Supp.2d 1052 (N.D. Cal. 2002).

17         Accordingly, Mr. Avenatti requests that the court appoint counsel from the  
18 Office of the Federal Public Defender to represent him. He agrees that he should  
19 contribute to his representation but requests that the Court defer determination of the  
20 exact amount of contribution until the end of the case. By that time he will have greater  
21 certainty regarding the status of his New York case and representation, his other civil  
22 lawsuits, and his ongoing financial responsibilities. The Court will have a clearer  
23 picture of its intention with respect to fines and restitution, if applicable, and the scope  
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26         <sup>3</sup> As the Court is no doubt aware, defendants spend significant resources on  
27 private counsel for complex document intensive cases like this one and sometimes  
28 exhaust their resources before the case is over. When that happens, the court is in the  
position of appointing counsel who must start the case from scratch, requiring  
additional resources and sometimes delay.

1 of work done by appointed counsel. In addition, the risk of self-incrimination posed by  
2 the information will be lessened at the end of the case.

3  
4 **B. The Government's Position**

5 The government has indicated that it is opposed to appointing counsel without  
6 the CJA Form 23. In support of its position, the government relies on *United States v.*  
7 *Ellsworth*, 547 F.2d 1096 (9th Cir. 1976). In *Ellsworth*, the defendant claimed on  
8 appeal that he was impermissibly denied counsel when the trial court rejected his  
9 request for appointed counsel based on his refusal to fill out the CJA Form 23. 547  
10 F.2d at 1097. In upholding the lower court's decision, the Circuit noted that the CJA  
11 Form 23 was developed as a "useful tool" for the court's inquiry into one's income  
12 status. *Id.* at 1098. Without that information, the court held, the trial court was  
13 justified in concluding that the defendant had failed to carry his burden of establishing  
14 indigency. 547 F.2d at 1097-98. Notably, the court did not hold that the Form CJA 23  
15 is required for appointed counsel, nor that the information requested by the form must  
16 be provided *at the beginning of the case*.

17 *Ellsworth* is easily distinguishable from the request in this case. First, unlike the  
18 defendant in *Ellsworth*, Mr. Avenatti is not claiming that he is entitled to appointed  
19 counsel at no cost to himself. He is agreeing up front that he should contribute to his  
20 representation. Nor is Mr. Avenatti refusing to provide any information to the court  
21 regarding his financial status. He is simply requesting an opportunity to provide that  
22 information at the end of the case in light of reasons discussed above, which make this  
23 case uniquely distinct from the vast majority of cases involving a request for court  
24 appointed counsel.

25 Further, the Ninth Circuit has made clear since the *Ellsworth* opinion that the  
26 process for seeking appointed counsel is a matter solely between a defendant and the  
27 court. The Circuit has repeatedly warned the government that it should not interject  
28 itself into that process because the government's exclusion is "a significant contributing



1 factor to the fairness of our system.” *United States v. Wells*, 879 F.3d 900, 913 (9th  
2 Cir. 2018); *see also United States v. Feldman*, 788 F.2d 625, 626 (9th Cir. 1986)  
3 (declining to request briefing from the government on a novel CJA reimbursement  
4 claim because the Act “excludes the government from participation in the Act’s  
5 compensation and reimbursement arrangements”). Permitting the government to  
6 participate, the Circuit has cautioned, might result in a system where the outcome of  
7 criminal trials would be determined by a defendant’s ability to retain qualified counsel  
8 rather than the integrity of the fact-finding process. *Wells*, 879 F.3d at 913 (citing  
9 *United States v. Hartfield*, 513 F.2d 254, 258 (9th Cir. 1975), *abrogated on other*  
10 *grounds by United States v. Sneezzer*, 900 F.2d 177 (9th Cir. 1990)). Thus, the  
11 government’s position should be given very little, if any, weight in the Court’s decision  
12 whether to grant the *ex parte* application.

#### 13 14 IV. CONCLUSION

15 For the foregoing reasons, Mr. Avenatti requests that the Court appoint counsel—  
16 namely Cuauhtemoc Ortega and Georgina Wakefield from the Office of the Federal  
17 Public Defender—to represent him in this case.

18  
19 Respectfully submitted,

20 HILARY POTASHNER  
21 Federal Public Defender

22  
23 DATED: May 14, 2019

By /s/ GEORGINA WAKEFIELD

24 GEORGINA WAKEFIELD  
25 Deputy Federal Public Defender  
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**PROOF OF SERVICE**

I declare that I am a resident or employed in Orange County, California; that my business address is the Office of the Federal Public Defender, 411 West Fourth Street, Suite 7110, Santa Ana, California 92701-4598, Telephone No. (714) 338-4500; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **EX PARTE APPLICATION FOR AN ORDER**

**APPOINTING COUNSEL** on the following individual(s) by:

<input checked="" type="checkbox"/> Placing same in a sealed envelope for collection and interoffice delivery addressed as follows:	<input type="checkbox"/> Placing same in an envelope for hand delivery addressed as follows:	<input type="checkbox"/> Placing same in a sealed envelope for collection and mailing via the United States Post Office addressed as follows:	<input type="checkbox"/> Faxing same via facsimile machine addressed as follows:
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Brett Sagel  
Assistant United States Attorney  
411 W. Fourth Street, Ste. 8000  
Santa Ana, CA 92701

This proof of service is executed at Santa Ana, California, on May 14, 2019.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Rebecca V. Perez  
**Rebecca V. Perez**